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No. 88-1626

In the Supreme Court of the United States

OCTOBER TERM, 1988

DEXTER R. SAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecution of petitioner for willful failure to pay income taxes was barred by the statute of limitations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 865 F.2d 713.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1988. A petition for rehearing was denied on February 6, 1989. Pet. App. 13a. The petition for a writ of certiorari was filed on April 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on three counts of willfully failing to pay his income taxes – one count for each of taxable years 1979, 1980, and

1981—in violation of 26 U.S.C. 7203. He was sentenced to one year's imprisonment on each count. The sentences on the counts involving 1980 and 1981 were suspended, except that he was required to serve 10 days in prison on those counts, concurrently with each other and consecutively to the sentence for the count involving 1979. Pet. 5. The court of appeals affirmed. Pet. App. 1a-6a.

On November 19, 1986, a grand jury returned an indictment charging petitioner with willfully failing to pay his federal income taxes for 1979 (as well as for 1980 and 1981).[1] The evidence at trial, the sufficiency of which is not in dispute, established that petitioner did not file an individual income tax return for 1979 when that return was due on April 15, 1980. Petitioner applied for an extension of time within which to file his return, but the Internal Revenue Service denied the requested extension. Pet. 6. Petitioner eventually filed a 1979 tax return on November 24, 1980.

Petitioner's tax return reflected an adjusted gross income of $15,750 and a tax due and owing in the amount of $3,496. Petitioner did not, however, pay the tax due when he filed the return. 1 Tr. 31-33, 70. Attached to the return was a letter from petitioner's accountant, stating: "Taxpayer reports that he is short of funds. He assures us that he will make arrangements to pay." *Id.* at 34.

At the close of the government's case, petitioner moved for entry of a verdict of acquittal on the 1979 count, arguing that the count was barred by the statute of limitations. Petitioner asserted that the crime of willfully failing to pay income taxes for 1979 occurred on April 15, 1980, when the income tax return was required to be filed. The ap-

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[1] Only the conviction on the count involving 1979 is at issue in the present petition.

plicable six-year statute of limitations, petitioner claimed, barred prosecution unless he was indicted on or before April 15, 1986.[2] Because he was not indicted until November 19, 1986, petitioner claimed that the indictment was out of time. The district court denied petitioner's motion. C.A. App. 26-29; see Pet. App. 2a.

The court of appeals likewise found the indictment timely. Pet. App. 1a-6a. The court rejected petitioner's argument that the statute of limitations for his offense of willful failure to pay a tax began to run on the date his tax return was due to be filed. The court held instead that the statute of limitations began to run on the date the failure to pay became willful, because only then was his crime complete. The court concluded that the jury could reasonably find that petitioner's failure to pay his 1979 taxes became willful on or after November 24, 1980, which was within the six-year period preceding the indictment. *Id.* at 4a-6a.

ARGUMENT

The decision of the court of appeals is correct. A mere failure to pay a tax does not amount to a violation of

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[2] The applicable statute of limitations for violations of 26 U.S.C. 7203 is contained in 26 U.S.C. 6531, which provides, in part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the Internal Revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years
>
> * * * * *
>
> (4) for the offense of willfully failing to pay any tax, or make any return * * * at the time or times required by law or regulations.

26 U.S.C. 7203. Rather, it is only when the failure is willful that a violation of the statute occurs. *United States* v. *Tucker*, 686 F.2d 230, 232 (5th Cir.), cert. denied, 459 U.S. 1071 (1982); *United States* v. *Andros*, 484 F.2d 531, 532 (9th Cir. 1973). As the court of appeals noted (Pet. App. 4a), criminal statutes of limitations generally begin to run only when the crime is complete—that is, when every element of the crime has been committed. See *Toussie* v. *United States*, 397 U.S. 112, 115 (1970). For that reason, the court correctly concluded that the statute of limitations for a willful failure to pay a tax begins to run when the failure becomes willful. See *United States* v. *Andros*, 484 F.2d at 532.

A failure to pay a tax may be willful when the return is due, or it may become willful later. *Capone* v. *United States*, 51 F.2d 609, 617 (7th Cir.), cert. denied, 284 U.S. 669 (1931). The determination when willfulness manifests itself is a factual issue for the jury. *United States* v. *Hook*, 781 F.2d 1166, 1170-1173 (6th Cir.), cert. denied, 479 U.S. 882 (1986). In this case, the jury was instructed to determine petitioner's intent to pay the taxes that he owed. When he filed his 1979 return on November 24, 1980, petitioner attached a note asserting that he intended to "make arrangements to pay" the taxes owed. Pet. App. 5a. Because the jury could have found that petitioner's intention never to pay the tax due for 1979 arose at a later date (*i.e.*, after he filed his return with the note attached), the court of appeals properly concluded (*ibid.*) that the jury "could reasonably have determined that * * * [his] 'willfulness' not to pay the taxes owed did not occur until at least November 24, 1980." It follows, the court correctly ruled (*id.* at 5a-6a), that the jury could reasonably have concluded that petitioner committed every element of the crime of willful failure to pay the taxes for 1979 within six

years prior to the date of the indictment, November 19, 1986.[3]

Petitioner errs in relying (Pet. 11-12) on *United States* v. *Tucker, supra*, and *United States* v. *Ausmus*, 774 F.2d 722 (6th Cir. 1985). Both decisions involved the question whether the defendant's lack of assets or available funds with which to pay taxes negates willfulness. *United States* v. *Ausmus*, 774 F.2d at 724; *United States* v. *Tucker*, 686 F.2d at 232. Neither decision dealt with the question when the statute of limitations for a failure to pay begins to run.[4] That every taxpayer has an obligation to pay income taxes when they became due, as both decisions recognize, does not mean that a failure to pay taxes on the due date violates Section 7203 in the absence of willfulness.[5]

Finally, petitioner briefly suggests (Pet. 13) that the decision below approves a variance from the indictment. But petitioner has never before raised that contention in this case. See *EEOC* v. *FLRA*, 476 U.S. 19, 22 (1986) (issues not raised in the court below normally are not considered by this Court). In any event, the contention is incorrect. The indictment charged that petitioner was "required by law on or before April 15, 1980" to pay an in-

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[3] As the court of appeals noted (Pet. App. 5a), petitioner did not object to the district court's jury instructions.

[4] The defendants in *Ausmus* and *Tucker* regularly filed their income tax returns. *United States* v. *Ausmus*, 774 F.2d at 723; *United States* v. *Tucker*, 686 F.2d at 231. Even if the decision in this case conflicted with the decision in *Ausmus*, such an intracircuit conflict would not warrant this Court's review.

[5] Petitioner's reference (Pet. 9-10) to 26 U.S.C. 6513(a) does not strengthen his case. That statute sets the date on which a return is deemed filed when the taxpayer files his return early or pays his tax in advance. It has no application to a case such as this one, in which the issue is when the crime of willful failure to pay a tax became complete.

come tax of $3,496 owing for 1979, and it also charged that "he did willfully fail to pay said income tax." Pet. App. 1a-2a. The indictment did not charge that petitioner willfully failed to pay his tax on or before April 15, 1980. Accordingly, the evidence at trial that his failure to pay became willful on or after November 24, 1980, did not effect a variance from the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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